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NO. 83-686

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THE TRAVELERS INDEMNITY CO.,

Petitioner,

vs.

EWING, COLE, ERDMAN & EUBANK,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

I.

In its opposing Brief, Ewing, Cole misconstrues the express basis upon which Travelers is petitioning this Court when it characterizes the issue before the Court as the review of a question of substantive state law. Rather, the sole basis upon which Travelers petitions this Court is the meaning and application of Federal

Rule of Civil Procedure 52(a): Whether a finding of negligence is considered under that rule as a finding of fact reviewable by a court of appeals under the clearly erroneous standard or is it, as the United States Court of Appeals for the Third Circuit in the instant matter determined, a mixed question of law and fact reviewable by the appellate court on a plenary basis. As is fully briefed by Petitioner in its earlier brief, the instant case has created an irreconcilable conflict between the circuits on this issue and has so far departed from the usual course of judicial proceedings to call for an exercise of this Court's jurisdiction. It in no way raises, argues or requests this Court to determine any question of state law.

II.

In its opposing Brief, Ewing, Cole also rewrites the opinion of the United States District Court in this present case as characterizing the District Court's clear finding of fact as rather a specific standard of conduct reviewable as a matter of law on a plenary basis. This is evident from the following:

EWING COLE'S BRIEF:

> "Rather, the court went far beyond the general standard, determining that Ewing, Cole had a 'professional duty' to render quasi-legal advice on a matter that has never been recognized as within the specific expertise of design professionals." (Ewing, Cole Brief, at 13).

JUDGE FISHER'S OPINION:

> "I find that a reasonably prudent architect in this situation would at least inform and advise his client

of any methods of protecting the owner's property interest and materials stored away from the construction site." (23A)

This conceptual shift is of course necessary for Ewing, Cole to make the argument that it does; however, the fact of the matter is that the position presently argued by Ewing, Cole was neither the case as tried by Travelers and Ewing, Cole or the opinion written by Judge Fisher.

This attempt is even more apparent when one examines Ewing, Cole's attempt to distinguish the case of *Stirling Drug, Inc.* v. *Yarro*, 408 F.2d 978 (8th Cir. 1969). Ewing, Cole states that *Stirling Drug, Inc., supra* "is inapposite to the present case because the Eighth Circuit determined specifically that the trial court had not applied a higher standard of conduct, but had imposed the 'undisputed standard' of a duty to make reasonable efforts to warn." (Ewing, Cole Brief, at 13). This statement is correct only insofar as the Eighth Circuit was not fooled by the appellant's argument in that case, as was the Third Circuit in the instant case. The Stirling Drug appellant, displeased with a fact finding by the District Court subjecting it to liability, argued before the Eighth Circuit (as did the appellant, Ewing, Cole in this case before the Third Circuit) that the trial court had adopted an erroneous legal standard—rather than requiring it to make reasonable efforts to warn of the dangers of a certain drug, the court instead subjected it to the duty of warning by the most effective method. *Id.* at 990. This argument of the appellants in the *Stirling Drug, Inc.* v. *Yarro* case was undoubtedly on account of the fact that the court concluded that the appellant should have notified all of the nation's physicians by use of its detail men of new warning information on the prescription drug involved in the case. *Id.* at 991.

The Eighth Circuit examined the opinion of the trial court in that matter and determined that it was clear that the court had "found as a *fact* that failure to make any effort to instruct its detail force, who promoted use of the drug, to warn the physicians on whom they were calling constituted failure to make reasonable efforts to warn the prescribing physicians." *Id.* at 991.

Likewise, Ewing, Cole's entire brief, including its reliance on cases within it, is based upon the exact same premise—that Judge Fisher's finding of fact ("I find that a reasonably prudent architect in this situation would at least inform and advise his clients of any methods of protecting the owner's property interest in materials stored away from the construction site") was, instead, an articulation of a legal standard of care. As indicated earlier, this is simply not the case. As specifically enunciated by Judge Fisher, the legal standard utilized by him in his decision below against Ewing, Cole was that "'[t]he standards of reasonable care, which applied to the conduct of architects, are the same as those applying to . . . like professional men engaged in furnishing skilled services for compensation . . .'" (21A)

In light of the failure of Ewing, Cole to face the issues presented in both the opinion below and in the Petition filed on behalf of Travelers without rewriting or misinterpreting them, the need for review of the action below is indisputable.

Respectfully submitted,

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